between the parties in 1927 have been materially affected by the passing of the Mining Enactment, 1928, which repeals the Mining Enactment, 1911, under the provisions of which the sub-sub-sub-lease was made, and of the Tin and Tin-ore (Restriction) Enactment, 1931. Section 2 (ii) of the Mining Enactment, 1928, provides for the saving of existing rights as follows:—

> "Nothing in this Enactment shall invalidate any title to occupy land for mining purposes lawfully given under any repealed Enactment or in the absence of an express provision in that behalf abrogate any of the rights or privileges expressly conferred thereby; provided that every such title, right or privilege shall be limited to the extent prescribed by the Enactment under or by virtue of which the same was granted or conferred: and provided further that, save as by such title or Enactment is expressly otherwise provided, it shall be incumbent upon a lessee or occupier of the said land to hold and mine the same in accordance with the covenants and conditions set forth in this Enactment, and in all respects as if his title to occupy the same were a lease issued under this Enactment."

The Tin and Tin-ore (Restriction) Enactment, 1931, it is to be observed, does not make provision for the saving of existing rights under the "Mining Enactment, 1928." yet the Rules made in pursuance of the Tin and Tin-ore (Restriction) Enactment, 1931, have necessarily materially affected mining operations and the interests of parties to mining leases entered into prior to the passing of the Enactment. Apart from this Enactment and the Rules made thereunder, the Mining Enactment, 1928, has also effected changes in the law and in particular as to the status of sub-sub-sub-leases. In the present case the plaintiff seeks to compel the defendant to renew for a period of one year only (this period being fixed to meet certain requirement of the Mining Enactment, 1928), a sub-sub-sub-lease entered into before the passing of the Mining Enactment, 1928, and the Tin-ore (Restriction) Enactment, 1931. He is seekig to compel the defendant to renew a contract under conditions which have materially changed by subsequent legislature since that contract was entered into—in effect he is endeavouring to force the defendant to enter into an entirely new contract.

Mr. E. C. Watson for the plaintiff contends that there is a concluded contract and that at the time the contract was made both parties thereto intended that there should be a renewal. With this contention I agree, but obviously the subsequent initiation of legislature which materially affects mining conditions then existing and materially affects the terms of their contract could not have been in the minds of the parties in 1927. As Mr. George Terrell for the defendant puts it, the parties may have been *ad idem* in 1927, but they must have ceased to be so after the passing of the Mining Enactment in 1928.

In 1927 the parties contracted to sub-sub-sub-lease certain mining land "for the period of five years and renewals thereof" subject to the provisions of the Mining Enactment, 1911. It is clear in my opinion that the performance of this covenant to renew has been rendered impossible by the subsequent legislation and that the defendant is excused in law from performing her promise.

There is nothing in the document in question from which it appears that the parties intended to bind themselves with reference to the future state of the law, the presumption is that the parties intended to contract with reference to the law existing at the time when the contract was made. See 7 Halsbury's Laws of England, p. 431, para 881 and cases cited thereunder and Section 56 of the Contract Enactment, 1899.

It appears to me that these are the only points which it is necessary for me to go into. For the reason given I am of opinion that the plaintiff's claim should be dismissed and judgment will be entered for the defendant with costs.

Judgment accordingly.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY and GERAHTY, JJ. June 10, 1933.

THE KWONG YIK (SELANGOR) BANKING CORPORATION, LTD. — Plaintiffs Appellants

vs.

1. THE MALAYAN DAILY EXPRESS (1926), LTD.
2. YAP YOW CHING
3. K. ARUMUGAM
4. LOH KIM SWI
5. M. CUMARASAMI

— Defendants Respondents

[SELANGOR CIVIL APPEAL No. 9 of 1933]

Limitation—bankers—overdraft—guarantee—Limitation Enactment, Sec. Schedule, Art. 95.

A Company, being short of funds, made an arrangement with the plaintiff bank whereby it was allowed to overdraw from time to time. Such overdraft was covered by a guarantee in writing by which the guarantors guaranteed the payment "of all moneys which may at any time be due to you from the firm on the general balance of its account with you." It was also provided by the same instrument that the guarantee should be a continuing one to the extent of $40,000 and should be applicable "to the whole ultimate balance that may become due to you from the firm." Upon one of the

guarantors giving notice to determine the guarantee, the bank closed the Company's account and demanded repayment of the overdraft under the guarantee. In a suit by the bank against the guarantors for the recovery of the amount of overdraft.

Held, (by the Court of Appeal, Terrell, Ag. C.J., Whitley and Gerahty, JJ., reversing the decision of McFall, J.) that Article 95, Second Schedule, Limitation Enactment, controls a guarantee against overdrafts and that the period of limitation commenced from the time when the bank made a demand and the guarantors failed to pay.

APPEAL from the decision of McFall, J.

The facts of the case are set out in the Judgments of the Court of Appeal. The issue before the Court was which article of the Limitation Enactment applies to a guarantee for overdrafts by bankers' customers. McFall, J., held that Article 47 of the Limitation Enactment applies and that the period of limitation fixed by that article begins to run from the date of each advance made by the bank to the customer. The plaintiff bank appealed.

The following were the material portions of the guarantee:—

"In consideration of you THE KWONG YIK (SELANGOR) BANKING CORPN., LTD., having at my / our joint and several request agreed to allow THE MALAYAN DAILY EXPRESS (1926) LIMITED, (hereinafter called "the Firm") to overdraw its current banking account with you we the undersigned M. CUMARASAMI, LOH KIM SWEE, YAP POW CHING and K. ARUMUGAM jointly and severally guarantee to and agree with you as follows:—

"1. Payment shall be made to you of all moneys which may at any time be due to you from the Firm on the general balance of its account with you (such balance to include all interest, costs, charges for commission and other expenses which you may in the course of your business as bankers charge in respect of any advances or discounts made to it or on its account with you or for keeping the same) and also of all bills or notes which may be held by you and upon which the Firm is or may become liable to you and of all costs, charges or expenses which you may incur in enforcing or obtaining payment of such balances bills or notes as aforesaid.

"2. This guarantee shall be a continuing guarantee to the extent of dollars Forty thousand only ($40,000/–) with interest thereon at the rate of nine point six per cent. per annum (9.6%) from the date of the accrual of our liability thereunder and of our receiving notice thereof from you and shall (but always subject to the aforesaid maximum limit of our liability) be applicable to the whole ultimate balance that may become due to you from the Firm and not merely to a portion thereof coextensive with the amount of the said limit.

"3. All dividends, compositions and moneys received by you from the Firm or from any other persons or Estates capable of being applied by you in reduction of the Firm's indebtedness to you shall be regarded for all purposes as payments in gross and you shall be entitled to prove against the Estate of the Firm and the members thereof should the Firm become insolvent or bankrupt in respect of the whole amount of its indebtedness to you and without any right on our part to be subrogated to you in respect of any such proof until you have received from the said Estate or from other sources the full amount of the said indebtedness and subject only to the obligation of refunding to us any moneys received by you in excess of the total ultimate balance that may be due to you from the Firm.

"11. (a) This guarantee shall not be discharged or affected by my death but shall continue to be operative until determined as to future transactions by one calendar month's notice in writing given to you by me or in case of my death by my personal representatives.

(b) This guarantee shall not be discharged or affected by the death of any one or more of us but shall continue to be operative until determined as to future transactions by one calendar month's notice in writing given to you by us or on our behalf."

Roland Braddell (with him *E. D. Shearn* and *T. Rajendra*) for plaintiff-appellant.

W. G. W. Hastings (with him *A. K. Sen*) for respondent Loh Kim Swi.

E. Jeff for 5th defendant respondent M. Cumarasami.

At the hearing before McFall, J., *G. K. Narayan* appeared for 5th defendant respondent.

Cur. Ad. Vult.

TERRELL, AG. C.J.—In this case there were originally five defendants to the plaintiff-appellants' action. The 1st defendants were the principal debtors, and the remaining defendants were the guarantors, under a written agreement of guarantee dated the 5th January, 1927,

(exhibit B). The 1st and 2nd defendants submitted to judgment, but the remaining defendants the present respondents, disputed the claim on various grounds. The claim was for $40,572.11 and interest at 9.6 per cent. per annum from the 1st August, 1932, until judgment. The learned trial Judge found that the actual amount was correct, but that the claim, except as to interest, was barred by limitation, and on the appeal this last issue was the only one before the Court.

Considerable argument was addressed to the Court below and to the Court of Appeal as to which article of the Limitation Enactment applied. There are three articles which might control a contract of this kind, namely, Nos. 47, 65 and 95, corresponding to Articles 65, 83, and 116 of the Indian Act. They read as follows:—

	Description of Suit.	Period of Limitation.	Time from which period begins to run.
47.	For compesation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives, or the contingency happens.
65.	Upon any other contract to indemnify.	Three years	When the plaintiff is actually damnified.
94.	For compensation for the breach of any contract, expressed or implied, not in writing and not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
95.	For compensation for the breach of a contract in writing.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract in writing.

It should, however, be pointed out that article 116 of the Indian Act is not entirely the same as article 95 of the Enactment, and reads as follows:—

"For compensation for the breach of a contract in writing registered.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not registered."

The learned trial Judge agreed with the defendants' contention that article 47 applied, and that time ran from the date of each advance by the plaintiffs to the 1st defendants. The plaintiffs in the Court below contended that article 65 applied, and that time ran from the 5th January, 1932, when the plaintiffs gave the 1st defendants notice to repay the overdraft. In the Court of Appeal the plaintiffs argued that, as between articles 47 and 65, article 65 was the article to be preferred, and that if there were difficulties in bringing the claim under article 65, it fell under article 95, and that the period of limitation was six years from the 5th January, 1932.

It is important to notice shortly the facts which are not in dispute. The 1st defendants were a limited company incorporated in 1926 for the purpose *inter alia* of publishing a daily newspaper in Kuala Lumpur. The other defendants were either directors or otherwise interested in the venture, and when the company became short of cash at the beginning of 1927, these defendants guaranteed the company's overdraft at the plaintiff bank. The guarantee was on the bank's usual printed form, which follows the form in the 1917 edition of the Encyclopaedia of Forms and Precedents. The guarantors guarantee in clause (1) the payment "of all monies which may at any time be due to you from the firm on the general balance of its account with you."

Clause 2 provided that the guarantee should be a continuing guarantee to the extent of $40,000, and should be applicable "to the whole ultimate balance that may become due to you from the firm."

Clause 3 negatived the right of the guarantors to be subrogated to the bank in respect of any demands they might receive on the bankruptcy or insolvency of the firm, until the bank had been repaid in full amount of the indebtedness and subject only to the obligation of refunding any moneys received in excess of the total ultimate balance that might be due to the bank from the firm.

I think that the contract must be read as a whole, and that what the guarantors guarantee was the payment of the ultimate balance due from the company to the bank.

The last cheque against the account that the bank honoured was a cheque for $1,900 on the 11th March, 1929, but the bank continued to charge the agreed rate of interest, and from time to time received cheques to account from the 1st defendants. They received a cheque on the 6th of February, 1929, and further cheques on the 25th August and 10th September, 1931, and the 7th January, 1932. They also received cheques on the 5th February and 5th March, 1932, after the account had been closed.

Now, the various articles to the second schedule of the Limitation Enactment nowhere refer specifically to a contract of guarantee. If, therefore, no special article can properly be applied, if follows that the contract must fall under one of the general articles.

The respondents' contention is that it falls under article 47, and if so, it is pertinent to enquire what is the specified time or the specified

contingency from which time will run. The respondents say that the specified time is the date of each advance and, in the alternative, the 2nd and 3rd respondents say it is the date when the account was balanced on the 30th January, 1929, after which no advance was made. For their main contention they rely on the principle of *Parr's Banking Company* v. *Yates*, 1898, 2 Q.B. page 460. On the other hand the appellants contend that if article 47 applies, the specified time is the date of the demand, namely the 5th January, 1932. It is important, therefore, to examine the actual wording of the contract, exhibit B. The respondents' contention involves reading into clause 1 of the guarantee a promise by the guarantors to repay to the bank immediately the amount of any advance they made to the company by allowing the company to overdraw, and the claim of the bank must be interpreted as a claim for compensation for failure to perform such promise. The short answer to that is that the guarantors promised nothing of the kind. What they promised to do was to repay to the bank the ultimate balance which might be found due from the firm to the bank, and even so there was no time or contingency specified when such ultimate balance might be ascertained. I find it therefore, impossible to apply the wording of article 47 to the contract now in issue.

I also find that the *Parr's Bank* case is no authority for the question now before the Court. It is urged indeed by the appellants that this case is one that should not be followed on the ground that it is inconsistent with *Hartland* v. *Jukes*, 158 E.R. page 1052, which is an earlier case of equal authority and which was not cited in the later case. Doubt has also been thrown on the *Parr's Bank* case in certain text books, in particular Hailsham's Halsbury, Volume 1, page 869, and Paget's Law of Banking, page 444. However that may be, I consider that the *Parr's Bank* case is no authority on the issue now before the Court, as the form of the guarantee in that case is essentially different from exhibit B. In the case mentioned, the guarantee, which was informal and comprised in a letter, contained an undertaking—

> "to guarantee to you the due payment and satisfaction of all monies and liabilities that may have been or may from time to time be owing or incurred by you," etc.

In exhibit B the undertaking is for payment—

> "of all monies which may at any time be due to you from the firm on the general balance of its account with you."

I have already said that, in view of clauses 2 and 3 'general balance' should be read as 'ultimate balance.' But even reading clause 1 as it stands, there is obviously no promise to repay from time to time every advance as it is made, which was the interpretation put by the Court on the guarantee in *Parr's Bank* case, "at any time" cannot be read as meaning 'from time to time,' and the expression 'at any time' can only refer to the time when the ultimate balance is ascertained. Such balance could, of course, be ascertained by the closing of the account any time, but that is a very different thing from a promise to repay each advance as it falls due. Nor do I think that the usual half-yearly statement can be regarded as 'an ultimate balance.' Such 'ultimate balance' could only be ascertained when the account was closed, which did not happen until the 5th January, 1932, when repayment was demanded.

The *Parr's Bank* case is also distinguishable on the ground that, under the law applicable thereto, limitation ran from the accrual of the cause of action. Now, a cause of action may or may not accrue, upon the actual wording of any particular contract of guarantee, every time the bank makes an advance to the company, but article 47 says nothing about the accrual of a cause of action., Even, therefore, if it could be argued that under exhibit B a fresh cause of action arose every time an advance was made, that is not the criterion under article 47. The accrual of a cause of action may be a matter of inference, but under article 47, the time or contingency cannot be a matter of inference—it must be 'specified,' or else the article cannot apply.

It is not so difficult to apply article 65, 'upon any other contract to indemnify,' but just as the appellants urged cogent reasons against the application of article 47, so the respondents also urged reasons against the application of article 65. Although to some extent a contract of guarantee is a contract of indemnity, it is not primarily so. The words are 'contract to indemnify, and the expression is, in particular, applicable to a contract of insurance, or a contract to indemnify a party against a payment which may not have to be made, or against a contingency which may never happen. A contract of guarantee, however, as defined in section 126 of the Contract Act, is a contract to perform the promise or discharge the liability of a third person in case of his default. In a sense the respondents are indemnifying the bank, but not against any payments which they may have to make, because the advance has already been made. The indemnity, if any, is against the failure of the firm to repay such advances, which is not the same thing. Primarily, the respondents are guaranteeing the performance by the firm of its implied promise to repay the advances to the bank. Although, therefore, as between articles 47 and 65, the latter is undoubtedly to be preferred, exhibit B does not easily or indubitably fall under article 65. If, however, article 65 is the proper article to be applied, then I have no

doubt that time began to run from the 5th January, 1932, when the firm was called upon to repay the overdraft. Time runs from the period when the plaintiff is 'actually damnified.' It appears to me impossible to argue that the bank were actually damnified each time they made an advance. It is the business of a bank to earn interest and banking charges by allowing overdrafts to approved constituents. How then can they be said to be damnified, *i.e.*, incur a loss, in doing that which it is their business to do for the purpose of securing a profit? No actual loss was incurred till on afterwards, when the firm failed to liquidate its overdraft.

Although it might be sufficient for the purpose of this appeal to decide that the article applicable is 65 rather than 47, and that time only began to run on the 5th January, 1932, there can be no doubt that article 95 'compensation for the breach of a contract in writing' can be applied without difficulty to the failure of the guarantors to perform their contract of guarantee. In the corresponding Indian section the words are "compensation for the breach of a contract in writing *registered*." In the Federated Malay States there are no registered contracts, but on the other hand, there is no Statute of Frauds, and generally a contract under the Contract Enactment *need* be in writing. It is not impossible to suppose that in a country where the formality of writing is not required by law, the legislature desired to give greater validity to a contract which actually was in writing, and accordingly provided a six year instead of a three year period of limitation. If the reasoning of the Privy Council in the case of *Tricomdas* v. *Gopinath*, 44 Indian Appeals, page 65, is adopted, the article should be applied to any contract in writing though not required to be so by law, and notwithstanding that if it were not in writing it might fall under a special article.

It is to be observed that in our article 95, as in the corresponding Indian article 116, the words 'not herein specially provided for' which occur in each case in the article immediately preceding, are omitted, and in the Privy Council case above quoted, this omission is regarded as critical (see page 70) and should be so regarded in the Federated Malay States Enactment. When the contract is in writing, article 95 can be applied whether or not there is any other article which would be applicable to a similar contract not in writing.

It was indeed argued before the Court of Appeal that, although in the Indian Act article 116 serves a useful purpose by providing a longer period of limitation for a registered contract, it is meaningless to introduce the article into the Federated Malay States Enactment omitting the word 'registered,' and that the article should be disregarded. A similar argument against article 95 was submitted to the Court in a Negri Sembilan case, (Seremban Civil Suit No. 117 of 1927, Civil Appeal No. 4 of 1928), but this method of approaching the Enactment is quite inadmissible; and in a recent case, *The Commissioner of Stamps* v. *Oei Tjong Swan and others*, Malayan Law Journal, volume 2, page 107, the Privy Council ruled that they could not countenance a suggestion that an apparently inconsistent section had been introduced into a Colony Ordinance *per incuriam*. If possible, effect should be given to every portion of the Enactment, and I see no difficulty in giving effect to article 95 in the manner indicated above.

It is not necessary to decide whether article 95 applies, when there is a special article dealing with a contract, such as a bill of exchange, which must necessarily be in writing, but that is no argument against the application of the article to a contract which is not necessarily in writing. the Enactment providing a different period of limitation according as to whether the contract is in writing or not. This interpretation also provides a sufficient explanation for the omission of some such words as 'not herein specially provided for,' which occur in article 94.

It must be remembered that the contract by the principal debtor and the contract by the sureties are separate contracts, and that different considerations as regards limitation apply. It is, for instance, well established that payment of interest by the principal debtor will keep the debt alive against him, but will not inure for the benefit of the sureties. It is perfectly logical, therefore, that six years should be required to bar an action against the sureties, while three years is sufficient in the case of the principal debtor. Six years is also the period of limitation in an action against sureties in England. For these reasons I am of the opinion that the guarantee before the Court falls under article 95, and that time only began to run when the contract was broken by the failure of the respondents to repay the firm's overdraft when called upon to do so on the 5th January, 1932.

It only remains to notice some of the Indian cases relied on by the learned trial Judge. The cases of *Raja Sreenath Roy* v. *Raja Peary Mohan Mookerjee*, 21 C.W.N. page 479, and *Shyam Chandra Bandopadhye and others* v. *Faithfull*, I.L.R. 44 Calcutta page 978, were all cases of guarantees for the repayment of a promissory by the promisor. As a promissory note payable on demand is payable immediately without demand being made, it was held that time ran from the date of the note, and that the sureties' liability fell under article 65 of the Indian Act, F.M.S. article 47. These cases are clearly distinguishable, and afford no parallel to the facts of the case now before the Court.

In the case of *Dwarkadoss Goverdhan Doss* v. *Chivakala Krishnavya*, 9 Ind. Cases (1911), page 204, the plaintiff had agreed to advance money to the 1st defendant from Rupee 1 to Rupees 2,000, and the guarantee by the 2nd defendant was as follows:—

> "If he does not pay the amount due by him to you according to the account, I shall stand forward and pay you the debt."

It was held that the guarantee fell under article 65, F.M.S. article 47. In this case also the wording of the guarantee is entirely different, and may be treated as similar to the guarantee in the *Parr's Bank* case, as each advance would create an immediate liability. It is also to be observed that the guarantee in the last cited case could not have fallen under Indian article 116, as it was not registered. In a similar case to be decided in the Federated Malay States the guarantee might well be held to fall under article 95.

In a local case, *Corporation Royal Exchange* v. *Teck Guan*, 2 F.M.S. Law Reports, page 92, the claim was on a contract of fire insurance, and article 95 was held by Sercombe Smith, C.J.C., to apply to such a contract, though it was also held that article 65 applied to cases of suretyship not covered by articles 63 and 64. An appeal to the Court of Appeal was dismissed, but no grounds for the decision of the appellate Court have been recorded. So far as concerns article 65, the decision is *obiter*, as the action involved a claim by the insured against the insurers, and no question of suretyship arose. The case is important, however, as indicating that a contract of fire insurance, which is *prima facie* 'a contract to indemnify,' will fall under article 95 if it is in writing, notwithstanding the wording of article 65, and this accords with the view which I have expressed above. In the Negri Sembilan case, *S. R. M. A. L. Ramasamy Chetty* v. *Tan See Poh and another*, (Seremban Civil Suit 117 of 1927, and Civil Appeal No. 4 of 1928, unreported), it appears to have been held by the trial Judge that article 65 applied to a guarantee by a surety comprised in a registered charge over land, but the decision in 2 F.M.S. Law Reports was not cited in the argument, and no grounds of decision were given by the Court of Appeal, which upheld the judgment of the Court below. This case, therefore, is of little assistance even if the facts were not entirely different.

I would therefore allow the appeal and direct judgment to be entered for the plaintiffs against the 3rd, 4th and 5th defendants for the sum of $40,572.11 with interest at the rate of 9.6% from 1st August, 1932, until the date hereof, and interest thereafter at the rate of 8% per annum. The appellants should have their costs here and below. The deposit will be repaid to the appellants.

WHITLEY, J.—There is no appeal upon the findings of fact in this case and the only questions to be decided are (i) which article of the Limitation Enactment applies to the guarantee and (ii) when the period of limitation begins to run.

The material parts of the guarantee are as follows:—

1. "Payment shall be made to you of all moneys which may at any time be due to you from the Firm on the general balance of its account with you (such balance to include all interest, costs, charges for commission and other expenses which you may in the course of your business as bankers charge in respect of any advances or discounts made to it or on its account with you or for keeping the same) and also of all bills or notes which may be held by you and upon which the Firm is or may become liable to you and of all costs, charges or expenses which you may incur in enforcing or obtaining payment of such balances bills or notes as aforesaid."
2. "This guarantee shall be a continuing guarantee to the extent of dollars Forty thousand only and shall (but always subject to the aforesaid maximum limit of our liability) be applicable to the whole ultimate balance that may become due to you from the Firm and not merely to a portion thereof coextensive with the amount of the said Limit."

ii. (a) "This guarantee shall not be discharged or affected by my death but shall continue to be operative untill determined as to future transactions by one calendar month's notice in writing given to you by me or in case of my death by my personal representatives."

(b) "This guarantee shall not be discharged or affected by the death of any one or more of us but shall continue to be operative until determined as to future transactions by one calendar month's notice in writing given to you by us or on our behalf."

It will be convenient to refer to the Plaintiff —Appellants as the Bank, to the first Defendant as the firm and to the respondents as the guarantors.

It is common ground that the only articles which could apply are articles 47,65 and 95.

The learned trial judge held that Article 47 applies and that the period of three years fixed

by that article begins to run from the date of each advance made by the Bank to the Firm. The last advance having been made more than 3 years before the Suit was instituted he gave judgment against the Bank.

Article 47 which is identical with Article 65 of the Indian Limitation Act reads as follows:—

	Description of Suit.	Period of Limitation.	Time from which period begins to run.
47.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives, or the contingency happens.

In order to bring the guarantee within this article it must be shewn to contain a promise to do something at a specified time or upon the happening of a specified contingency. It is quite clear that there is no specified time. Is there a specified contingency?

Three counsel representing three different respondents each advanced different suggestions as to what is the contingency specified. One suggested that it was the making of each advance by the Bank to the firm. Another that it was any striking of a balance and the other that it was the striking of the final balance. Mr. Braddell for the Bank argued that if there was any contingency specified it must be the failure by the guarantors to pay, when called upon to do so, the moneys due from the firm on the general balance of its account. This diversity of views as to what the contingency is seems to indicate that none is actually specified. Full value must be given to the word "specified" which is a very definite word. If the guarantee had read "Payment shall be made to you on demand" there would be a specified contingency and the article would clearly have applied. I do not think that the Indian case of *Dyarkadoss Govardhana Doss* v. *Chivakala Krishnaiya*, 9 Indian Cases 204 which was to some extent relied upon by the learned trial judge can be regarded as an authority inasmuch as the wording of the guarantee in that case was entirely different from the one under consideration. It contained no such expression as "Moneys due on the general balance of account" or "whole ultimate balance which may become due" which are of vital importance in our guarantee. I am accordingly of opinion that there is no specified contingency and that article 47 does not apply. I would add that if it were necessary to decide what contingency was contemplated by the parties I should hold that the view contended for by Mr. Braddell was the correct one and that the contingency was when the principal failed to pay and demand was made upon the guarantors for payment, and that the 3 years period of limitation began to run from the 5th January, 1932.

In considering article 65 it is necessary also to consider articles 63 and 64. The three articles read:

	Description of Suit.	Period of Limitation.	Time from which period begins to run.
63.	By a surety against the principal debtor.	Three years	When the surety pays the creditor.
64.	By a surety against a co-surety.	Three years	When the surety pays anything in excess of his own share.
65.	Upon any other contract to indemnify.	Three years	When the plaintiff is actually damnified.

It was argued that all contracts of guarantee are contracts to indemnify and in a loose sense of the words that undoubtedly is so but the Contract Act distinguishes between the two. They are separately defined in sections 124 and 126. One would have expected the article to have read "upon any other contract of guarantee or to indemnify" if it had been intended that contracts of guarantee shall be covered by this article. Much argument was addressed to us on the question as to when the Plaintiff was actually damnified and the diversity of suggestions put forward on this point would tend to support the view that the article was not intended to apply to a guarantee of this description. As between articles 47 and 65 I consider article 65 the more appropriate but even if it were applicable I should be quite unable to accept the contention of the respondent that the Bank was "actually damnified" as and when it made each advance by way of overdraft. Full weight must be given to the word "actually" and it seems to me that even though a Bank might be said to be technically damnified as soon as it put itself in the position of being owed money by a constituent it could not possibly be "actually" damnified when it had money out on a secured overdraft and was making its profits by charging interest thereon in the ordinary course of a banker's business. Actual damnification could not arise until the constituent failed to pay the ultimate balance when called upon to do so.

It follows then that in my opinion it is difficult to hold that this guarantee falls within either of these articles without straining their language. And the following passage in the judgment of the Board in the case of *Nagendra Nath* v. *Suresh*, A.I.R. 1932 Privy Council 165 is authority to show that this should not be done. "There is in their Lordships' opinion no warrant for reading into the words quoted any qualification.....the words mean just what they say. The fixation of Periods of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of place

and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

There remains then article 95. This article should read in conjunction with article 94. They are as follows:—

	Description of Suit.	Period of Limitation.	Time from which period begins to run.
94.	For compensation for the breach of any contract, expressed or implied, not in writing and not herein specially provided for.	Three years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
95.	For compensation for the breach of a contract in writing.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

In contradistinction to articles 47 and 65 which are special articles this article is general in its terms and accordingly recourse should only be had to it if the guarantee does not fall within one of the other two but when we have to deal as in this case with a form of contract which cannot be brought within any other article without straining the language of the article, such a case arises as the general article is designed to meet it. The wording of article 95 is exactly appropriate to this guarantee. It is a contract in writing between the Bank and the guarantors which was broken when, upon the Bank calling on the guarantors to pay the balance due in accordance with the terms of the contract, they failed to pay. The use of the word compensation occasions no difficulty inasmuch as the word is used in the Indian Contract Act in a very wide sense and it was held by the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jin Thakur*, I.L.R. 44 Calcutta 759 to apply to liquidated damages such as rent or royalties as well as to unliquidated damages.

It was contended that great caution should be observed in applying this article as its history suggests that it slipped into the Enactment, as it were *per incuriam* and that consequently its application involves certain anomalous and contradictory results. It is taken from the Indian article 116 with one important alteration. The Indian article reads "Compensation for breach of a contract in writing registered." In our article the word "registered" has been left out the reason being that in India there is machinery for registering contracts whereas here there is not. But very convincing reasons must be advanced before it should be assumed that the draftsman adapting the Indian Act to the needs of this country retained this article with these words deleted, inadvertently and without appreciating the consequences. Unless the article as it stands is meaningless and inconsistent with other articles full effect must be given to it. In my opinion there is no difficulty in applying it and I see no reason to suppose that the draftsman did not mean what he has said. In India parties to a contract desirous of clothing it with the highest degree of formality can register it. In this country they cannot—the most they can do is to put it in writing and what article 95 provides is that if they do that the longer period of limitation shall apply. If we consider articles 94 and 95 in relation to the present guarantee it is clear that if it were not in writing it would come under article 94 as being a "contract not herein specially provided for." Being in writing it comes under article 95 and the time when the period of limitation begins to run is the time when it would begin to run against a suit on a similar contract not in writing that is to say one under article 94 and that article provides that the time is when the contract is broken.

It was argued that if article 95 is held to apply an absurd situation arises in that a different period of limitation then applied in the case of the guarantors from that which applies in the case of the firm whose overdraft they were guaranteeing. I cannot see that that is necessarily unreasonable. The contract of guarantee is separate contract to which the firm was not a party and any payment of interest extends the time from which the period of limitation begins to run against the firm but not against the guarantors. But even if it were unreasonable that would afford no ground for declining to apply the article for as the Privy Council pointed out equitable considerations are out of place in construing such provisions. The words of the article are clear and must be taken to mean what they say.

There remains to be considered the effect of the English cases. They have of course no bearing upon the question as to which article applied but they are of some importance in considering the time from which the period of limitation should run in a collateral contract of guarantee. The learned trial judge felt bound by the case of *Parrs Bank* v. *Yates*, 1898 2 Q.B.D. 460 in which it was held that in the case of a continuing guarantee the right of action on each item of the account arose as soon as that item became due and was not paid and the statute ran from that date in each case in favour of both principal and guarantor. There are however reasons for which I think that case should not be followed. In the first place it is of doubtful authority. It is in direct conflict with the earlier case of *Hartland* v. *Jukes*, 158 E.R. 1052 which was curiously enough not cited or considered in the *Parr's Bank* case. In this earlier case it was

held by the Court of Exchequer (Pollock, C. B. delivering the judgment of the Court) that the mere existence of the debt unaccompanied by any claim by the bank would not have the effect of making the statute run from that date.

As Sir John Paget points out in his Law of Banking 4th Edition p. 445 the view taken in *Parr's Bank* v. *Yates* is altogether inconsistent with the intention and effect of a continuing guarantee. The object of such guarantee is the extension of a real working credit to the principal debtor. There could be no right of action against the guarantor unless there was also one against the principal debtor, and the gunrantee would be meaningless if the creditor could demand and enforce repayment of every overdraft within twenty-four hours or less from the time it was granted.

Lord Herschell said in *Rouse* v. *Bradford Banking Co.*, (1894) A.C., at p. 596:

> "It is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money, and the truth is that, whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature."

The decision in *Hartland* v. *Jukes* has never been overruled and we are I think entitled to regard it as good law.

Furthermore the wording of the guarantee in the *Parr's Bank* case is widely different from the one which we have to consider. The words "on the general balance of its account with you" and "this guarantee shall be applicable to the whole ultimate balance" are not to be found in the former case nor any words resembling them.

To sum up I am of opinion that article 95 is the article which should be applied and that the date of breach from which the enactment begins to run is 5th January, 1932, when the Bank made demand and the Guarantors failed to pay. Even if articles 47 or 65 were held to be appropriate the appellants would equally be entitled to succeed as under either of those articles the time from which the Enactment would begin to run would be the same date, 5th January, 1932.

I would allow the appeal with costs here and below.

GERAHTY, J.—The admitted facts giving rise to this appeal are as follows:—

On 20th December, 1926, the Malayan Daily Express (1926) Ltd., first defendants in the suit, applied to the Kwong Yik (Selangor) Banking Corporation, Ltd., the plaintiffs-appellants herein, for an overdraft of $40,000 on the personal guarantee of the 2nd, 3rd, 4th and 5th defendants in the suit who signed a guarantee to the plaintiffs, dated 5th January, 1927. On this guarantee the first defendants were allowed to overdraw. Transactions began on 7th January, 1927, and continued, the first defendants paying in money from time to time to the plaintiffs and the plaintiffs paying out money to the first defendants or on their account. The plaintiffs continued first defendants' account in this way until 5th January, 1932. On that day Loh Kim Swi (4th defendant) gave under clause 11 of the guarantee one month's notice to determine the guarantee. The plaintiffs thereupon on 5th January, 1932, closed the first defendants' account and demanded payment under the guarantee of $39,231.49 and interest at 9.6 per cent. until payment from all parties.

The first and second defendants had before trial submitted to judgment.

The learned trial Judge found upon the evidence that—

(1) The Plaintiffs' account and statement of accounts were perfectly correct and,
(2) That the plaintiffs had not done or omitted anything which in any way contravened the terms of the guarantee, or which was unreasonable or inequitable so as to release the guarantors.

The plea common to the 3rd, 4th and 5th defendants, the respondents herein, was that the plaintiffs' claim is barred by the Limitation Enactment, and that is the sole point in issue in the present appeal.

The learned trial Judge held that Article 47 of the Limitation Enactment is capable of applying and does apply to this suit on the present written guarantee and that it fixes a period of limitation of three years from the date of each advance made to the first defendants by the plaintiffs. It was further held that the claim for all advances made prior to 4th August, 1929, *i.e.*, three years before the institution of this suit has been barred by limitation; that the 3rd, 4th and 5th defendants are jointly and severally liable to pay all interest and charges enumerated in clause 1 of the guarantee which have accrued within the three years prior to 4th August, 1932, that as regards payment of interest by first defendants within that period such payments are to be appropriated as laid down in Sections 59-61 of the Contract Enactment.

In arriving at this decision the learned Judge has, it would appear, largely based himself upon the authority of *Parrs Banking Co., Ltd.* v. *Yates*, (1898) 2 Q.B. 460. To test whether that authority is applicable to the present case it is neeessary to set out the material parts of the contract of guarantee and to examine whether

the principles evolved in *Parrs Banking Co., Ltd.* v. *Yates*, are applicable thereto. By the contract of guarantee in question the respondents jointly and severally guaranteed to and agreed with the appellant Bank as follows:—

"1. Payment shall be made to you of *all moneys which may at any time be due to you from the Firm on the general balance of its account* with you (such balance to include all interest, costs, charges for commission and other expenses which you may in the course of your business as bankers charge in respect of any advances or discounts made to it or on its account with you or for keeping the same) and also of all bills or notes which may be held by you and upon which the Firm is or may become liable to you and of all costs, charges or expenses which you may incur in enforcing or obtaining payment of such balances, bills or notes as aforesaid.

"2. This guarantee shall be a continuing guarantee to the extent of dollars forty thousand only ($40,000/–) with interest thereon at the rate of nine point six per cent. per annum (9.6%) from the date of the accrual of our liability thereunder and of our receiving notice thereof from you and shall (but always subject to the aforesaid maximum limit of our liability) be applicable *to the whole ultimate balance that may become due to you from the Firm* and not merely to a portion thereof co-extensive with the amount of the said limit.

"3. All dividends, compositions and moneys received by you from the Firm or from any other persons or estates capable of being applied by you in reduction of the Firm's indebtedness to you shall be regarded for all purposes as payments in gross and you shall be entitled to prove against the estate of the Firm and the members thereof should the firm become insolvent or bankrupt in respect of the whole amount of its indebtedness to you and without any right on our part to be subrogated to you in respect of any such proof until you have received from the said estate or from other sources the full amount of the said indebtedness and subject only to *the obligation of refunding to us any moneys received by you in excess of the total ultimate balance that may be due to you from the Firm.*

"11. (a) This guarantee shall not be discharged or affected by my death but shall continue to be operative until determined as to future transactions by one calendar month's notice in writing given to you by me or in case of my death by my personal representatives.

(b) This guarantee shall not be discharged or affected by the death of any one or more of us but shall continue to be operative until determined as to future transactions by one calendar month's notice in writing given to you by us or on our behalf."

Now what are the obligations undertaken by the guarantors? It seems to me that they have undertaken to pay to the Bank all moneys due to it at any time from the first defendants on a general balance of the account between them, that the guarantee is a continuing one and is applicable to the whole ultimate balance due from the first defendants to the Bank limited to the extent of $40,000/–. That the guarantee will not be discharged by the death of any of the guarantors and shall continue to be operative until determined as to future transactions by one month's notice in writing.

Contrast this with the terms of the guarantee in the case of *Parrs Banking Co., Ltd.* v. *Yates.* There the guarantor, the defendant, undertook to guarantee the due payment and satisfaction of all moneys and liabilities that *may have been or may from time to time be owing* to or incurred by the Bank, on account with the guaranteed party with interest, commission and other banking charges. The guarantee was to be a continuing one and was not to be withdrawn except at the expiration of six calendar months from the day of written notice being given by the guarantor to the Bank for that purpose.

It was held in this case *per* Vaughan Williams, L.J., that "the cause of action on the guarantee arose as to each item of the account, whether principal, interest, commission or other banking charge, as soon as that item became due and was not paid, and, consequently, the Statute of Limitations began to run in favour of the defendant in respect of each item from that date."

It is to be observed that the terms of the guarantee in that case differ in essentials from the terms of the guarantee the subject of this appeal, there was a succession of guarantees, and that, in consequence, the decision in that case has no applicability to the present case.

The English cases of *Hartland* v. *Jukes*, 32 L.J. Ex. 162 and *Bradford Old Bank* v. *Sutcliffe*, (1928) 2 K.B. 833, have also been cited and discussed at some length. In the latter case consideration was given to the effect of the addition of the words "on demand." In the course of his judgment Lord Justice Scrutton after considering the effect of the word "demand" as used in the case of a present debt, points out that it is meaningless and that express demand is not necessary as in the case of a promissory note payable on demand. The learned Lord Justice then points out that it is otherwise where the debt is not present but to accrue or where

the debt is not a present debt but a collateral promise. He continues "The promise of a surety to pay on demand if his principal does not appears to me to be a collateral promise within the authorities; and I entertain no doubt that in this guarantee the provisions about demand are a real stipulation, and not mere words." He concludes "I am of opinion that the creditor must prove a real demand and therefore that the Statute of Limitations did not run till the demand had been made."

In the form of guarantee under review the words "on demand" do not appear. It is not then one of the facts which the appellant Bank must prove as part of their case. Lord Justice Scrutton in the same judgment in referring to the effect of the State of Limitation states "When the statute of James provided that actions must be commenced within six years next after the cause of such actions it meant after the occurrence of all the facts which the plaintiff must prove as part of his case—that is, at the time when the plaintiff could first have brought his action and proved sufficient facts to sustain it."

It seems to me from the authorities cited that they are clearly distinguishable on the facts and in law from the present case, for under the law applicable thereto, limitation ran from the accrual of the cause of action. What we have to do here is to construe the terms of the guarantee and apply to this particular contract the relevant article of the local Limitation Enactment.

Articles 47, 65 and 95 of the Limitation Enactment require consideration in the light of their possible application to the present case.

Article 47 runs as follows:

Description of Suit.	Period of Limitation.	Time from which period begins to run.
For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.

As I have observed the words "on demand" do not appear in the contract of guarantee in question—that document provides that payment shall be made of all moneys which may "at any time" be due to the Bank from the first defendants on the ultimate balance. It is clear then, in my opinion, that no specified time or contingency is provided for the ascertainment of any such ultimate balance, on the contrary, the respondents have undertaken to repay to the Bank the ultimate balance which may be found due to it from the first defendants at any time. In my opinion it follows that this Article cannot be applied to the present case.

Article 65 is as follows:

Description of Suit.	Period of Limitation.	Time from which period begins to run.
Upon any other contract to indemnify.	Three years	When the plaintiff is actually damnified.

Now the document in question is a "contract of guarantee" which is specifically defined in Section 126 of the Contract Enactment and for which no specific provision is made under any article in the Limitation Enactment. It is also in the nature of a "Contract of Indemnity" as defined in Section 124 of the Contract Enactment.

Article 65 speaks not of a contract of indemnity, but of a contract "to indemnify" and in a sense this is a contract to indemnify in that the respondents may be said to be indemnifying the Bank against the failure of the first defendants to repay advances made. In my view this Article cannot with any certainty be held to apply to a contract which is primarily a contract of guarantee.

Further Article 65 refers to any "other contract to indemnify." Articles 63 and 64 immediately preceding it, deal respectively with suits "By a surety against the principal debtor" and "By a surety against a co-surety." It has been contended that Article 65 must be read *ejusdem generis* with Articles 63 and 64. I have some difficulty in deciding what weight should be given to this contention and it is unnecessary to do so.

Mr. Hastings for the Respondents cited the case of *Collinge* v. *Heywood*, 112 English Reports 1352, and pointed out that no contract of guarantee could fall under the principle laid down in that case. Further no Indian cases have been cited to show that the equivalent Article 83 of the Indian Limitation Enactment has been applied to a contract of guarantee.

Mr. Hastings has, in my opinion, established a strong case for the non-applicability of Article 65 to the present case. On the other hand Mr. Roland Braddell for the appellants has equally consistently destroyed the applicability of Article 47. Assuming however for one moment that Article 65 did apply, even then, in my opinion, it would be fatal to the respondents' case for the period of three years would run from the date when the plaintiffs were "*actually damnified*" and that is unquestionably from the 5th January, 1932; when the account was definitely closed and default was made. With the exclusion of Articles 47 and 65 we are left with Article 95 which runs as follows:—

Article 95.

Description of Suit.	Period of Limitation.	Time from which period begins to run.
For compensation for the breach of a contract in writing.	Six years	When the period of Limitation would begin to run against a suit brought on a similar contract not in writing.

Here we have an article which undoubtedly covers this case. The article is couched in general words, and while it is true that general words must be read as being governed by the use of special words if such exists, the arguments adduced by both counsel in this case in my view show clearly that no special provision in the second schedule to the Limitation Enactment can be held to apply to the contract in question.

The application of this Article has been criticised on the ground that the equivalent Article 116 of the Indian Contract Enactment applies only to registered contracts and that as there is no registration in the Federated Malay States Article 95 would apply to all written contracts and be inconsistent with other articles in the schedule dealing with other written contracts and that the article should be disregarded. I am not prepared to accept that contention. In my opinion it may well be that the legislature when inserting Article 95 foresaw that it would not be possible to deal specifically with every class of written contract, and thus designed this Article to meet the case of written contracts for which special provision is otherwise lacking in the second schedule. I am of opinion that before Article 95 should be held applicable to any particular written contract all other Articles in the schedule of possible application must first be eliminated. After applying just such a process of elimination, I have come to the conclusion that Article 95 applies to the particular contract of guarantee in issue and that the period of six years limitation begins to run as against respondents from 5th January, 1932, when the breach in respect of which this suit was instituted occurred.

For these reasons I would allow the appeal and direct judgment to be entered for the plaintiffs against the 3rd, 4th and 5th defendants for the sum of $40,572.11 with interest at the rate of 9.6 per cent. per annum from 1st August, 1932, until date hereof and interest thereafter at the rate of 8% per annum and would order the respondents to pay the costs of this appeal and the costs below. The deposit to be repaid to the appellants.

Appeal allowed.

Solicitors for the Appellants—*Rajendra and Teik Ee.*

Solicitor for 3rd Defendant Respondent (K. Arumugam)—*A. K. Sen.*

Solicitors for 4th Defendant Respondent (Loh Kim Swee)—*Au Yong Bros.*